Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO SK1451 OF 1985
CHARLES HO J
14 DECEMBER 1994

Contract *— Letter of intent — Variation of terms of building contract — Effect of letter of intent — Whether concluded contract between parties — Whether parties still negotiating*

Contract *— Building contract — Termination — Whether wrongful — Whether contractor had breached terms of contract — Factors to be considered*

Contract *— Damages — Building contract — Claim for loss of profits — What is reasonable profit margin*

The defendant had appointed the plaintiff to construct a chicken farm project in Labuan for a fee of 15% of the total cost of the project which was budgeted at RM37m. The parties executed a contract dated 16 November 1983 but negotiations continued and resulted in the execution of another contract in May 1984 ('the 1984 contract'). Disputes later arose and the progress of the construction works was not satisfactory. An independent quantity surveyor was appointed to resolve the disputes, followed by three meetings. At the end of the second meeting, a document called the 'Final summary' was initialled by the plaintiff's representative and the quantity surveyor, containing an increased contract sum which the plaintiff contended was a concluded amount, but this was disputed by the defendant. Subsequently, a letter of intent ('the letter of intent') was sent by the defendant to the plaintiff confirming the decisions reached at the meetings. On 12 June 1985, notices to speed up the work and to remove and rectify various defective works were given by the defendant to the plaintiff. The defendant subsequently terminated the contract through a letter dated 4 July 1985 ('the notice of termination').

The plaintiff alleged wrongful termination and claimed damages of: (a) RM13,818,693 under the letter of intent which it alleged was a concluded new contract but which the defendant denied; or (b) alternatively, for RM7,533,658.74 under the 1984 contract which the defendant maintained was still in force at the time the notice of termination was given. The defendant counterclaimed for costs of rectification and completion of defective works. The main issues were: (1) whether the letter of intent was a concluded contract; and (2) if the contract between the parties at the time of termination was not contained in the letter of intent but was contained in the May 1984 contract, whether the plaintiff was in breach of its obligations.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

(1) At the time the letter of intent was issued, negotiations seemed to be still going on and there were still some matters which required further agreement. There could only be a new contract after the

parties had agreed on all the matters which had to be agreed upon and a finalized contract sum had been reached.

(2) The letter of intent was not a concluded contract and at all material times, the parties had considered themselves to be still bound by the 1984 contract.

(3) In deciding whether the termination of the 1984 contract was wrongful, the most important consideration was whether there was delay and other breaches as claimed by the defendant and whether in all the relevant surrounding circumstances including the extent of such breaches, if any, the defendant was justified in determining the contract.

(4) It was clear that some of the works were defective in that the plaintiff had not taken the necessary care to ensure that they were of the required standard or quality and in accordance with specifications. It was also clear that there had been stoppages of work and delays in the performance of the contract. The plaintiff had also not complied with the notices of 12 June 1985 issued by the defendant. In the result, the determination of the contract by the defendant was justified.

(5) The court found that the defendant had incurred costs to rectify the defective works and to complete the projects. The counterclaim of the defendant for RM3,209,917.20 with interest at 8%pa from the date of filing and costs was thus allowed.

Obiter:

With respect to the plaintiff's claim for damages, on the evidence, the profit margin of 15% of the project cost was very much in the minds of both parties. In all the circumstances, if the claim was to be allowed, a profit margin of 10% would be reasonable.

[Bahasa Malaysia summary

Defendan telah melantik plaintif untuk membina sebuah projek ladang penternakan ayam di Labuan bagi fee sebanyak 15% daripada jumlah kos projek itu yang telah diperuntukkan belanjawan RM37m. Pihak-pihak telah menyempurnakan suatu kontrak yang bertarikh 16 November 1983 tetapi rundingan telah diteruskan dan berkesudahan dalam pengikatan suatu kontrak lain pada Mei 1984 ('kontrak 1984 itu'). Pertikaian kemudiannya berbangkit dan perjalanan kerja-kerja pembinaan tidaklah memuaskan. Seorang juruukur bahan bebas telah dilantik untuk menyelesaikan pertikaian itu, diikuti dengan tiga mesyuarat. Pada akhir mesyuarat kedua, suatu dokumen yang dipanggil 'Ringkasan akhir' telah diparapi oleh wakil plaintif dan juruukur bahan itu, yang mengandungi suatu jumlah kontrak yang dinaikkan. Plaintif menegaskan bahawa jumlah itu merupakan suatu jumlah yang dipersetujui, tetapi ini telah dinafikan oleh defendan. Kemudiannya, suatu surat niat ('surat niat itu') telah dihantar oleh defendan kepada plaintif untuk mengesahkan keputusan yang telah dicapai pada mesyuarat-mesyuarat itu. Pada

12 Jun 1985, notis-notis untuk mempercepatkan kerja dan untuk memindahkan dan memperbaiki berbagai kerja yang tidak memuaskan telah diberi oleh defendan kepada plaintif. Berikutan itu, defendan telah menamatkan kontrak itu melalui sepucuk surat yang bertarikh 4 Julai 1985 ('notis penamatan itu'). A

Plaintif mengata bahawa penamatan itu adalah salah dan menuntut ganti rugi sebanyak: (a) RM13,818,693 di bawah surat niat itu yang dikatakannya adalah suatu kontrak baru yang diikat tetapi yang dinafikan oleh defendan; atau (b) secara alternatif, sejumlah RM7,533,658.74 di bawah kontrak 1984 itu yang didakwa oleh defendan masih berkuatkuasa pada masa notis penamatan itu diberikan. Defendan sebaliknya menuntut balas untuk kos kerja membaiki dan menyiapkan kerja-kerja yang tidak memuaskan. Isu-isu penting adalah: (1) sama ada surat niat itu adalah satu kontrak yang terikat di antara pihak-pihak itu; dan (2) jika kontrak di antara pihak-pihak itu pada masa penamatan tidak terkandung di dalam surat niat itu tetapi terkandung di dalam kontrak 1984 itu, sama ada plaintif telah mengingkari kewajipannya. B C D

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Pada masa surat niat itu dikeluarkan, rundingan nampaknya masih diteruskan dan masih terdapat beberapa perkara yang perlu dipersetujui. Suatu kontrak yang baru hanya boleh diikat selepas pihak-pihak itu telah bersetuju atas kesemua perkara yang perlu dipersetujui dan suatu jumlah kontrak yang muktamad telah dicapai. E

(2) Surat niat itu bukanlah suatu kontrak yang terikat dan pada kesemua masa yang penting, pihak-pihak itu berpendapat bahawa mereka masih diikat oleh kontrak 1984 itu. F

(3) Dalam mempertimbangkan sama ada penamatan kontrak 1984 itu salah, pertimbangan yang paling penting adalah sama ada terdapat kelengahan dan keingkaran yang lain seperti yang didakwa oleh defendan dan sama ada memandangkan keadaan sekeliling yang relevan secara keseluruhan termasuk takat keingkaran itu, jika ada, defendan berjustifikasi untuk menamatkan kontrak itu. G

(4) Adalah jelas bahawa sebahagian daripada kerja-kerja itu tidak memuaskan kerana plaintif tidak mengambil langkah-langkah yang perlu untuk memastikan bahawa kerja-kerja itu mencapai piawaian atau mutu yang diperlukan dan mengikut spesifikasi. Adalah jelas juga bahawa terdapat pemberhentian kerja dan kelengahan dalam pelaksanaan kontrak itu. Plaintif juga tidak mematuhi notis-notis yang bertarikh 12 Jun 1985 yang dikeluarkan oleh defendan. Kesimpulannya, penamatan kontrak itu oleh defendan adalah berasas. H I

(5) Mahkamah mendapati bahawa defendan telah menanggung kos untuk memperbaiki kerja-kerja yang tidak memuaskan dan untuk

menyiapkan projek itu. Dengan demikian, tuntutan balas defendan untuk RM3,209,917.20 dengan faedah pada 8% setahun dari tarikh writ difailkan dan kos dibenarkan.

Obiter:

Berkaitan dengan tuntutan plaintif untuk ganti rugi, atas keterangan, margin keuntungan sebanyak 15% daripada kos projek itu tentunya di dalam fikiran kedua-dua pihak. Di dalam keadaan sedemikian, jika tuntutan itu dibenarkan, suatu margin keuntungan sebanyak 10% adalah berpatutan.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal.]

Notes

For a case on a letter of intent, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1846.

For cases on termination of building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1320–1323; [1993] Mallal's Digest 454.

For cases on damages, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1442–1494; [1993] Mallal's Digest 464–468.

Cases referred to

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99 (folld)
Lin Nyuk Chan v Wong Sz Tsin [1964] MLJ 200 (distd)

Legislation referred to

Contracts Act 1950 s 74(1)

G Sri Ram (*Colin Lau* with him) (*Colin Lau & Co*) for the plaintiff.
V Pradhan (*K Chiam* with him) (*Chin Lau Wong & Foo*) for the defendant.

Cur Adv Vult

Charles Ho J: The plaintiff in this action is claiming for damages for wrongful termination of contract. The plaintiff's claims are:

(a) for a sum of RM13,818,693 under the letter of intent dated 3 April 1985 which according to the plaintiff was a concluded new contract but which the defendant has denied to be so;

(b) alternatively, for a sum of RM7,533,658.74 under the contract entered into between the parties in May 1984 (hereinafter referred to as 'the 1984 contract') which the defendant has throughout maintained as being still in force at the time the notice of termination was given.

Background facts

The plaintiff was formed on 30 January 1981. The shareholders of the plaintiff were and apparently still are Mohd Toufic Ozeir (PW1) holding

244,999 shares, Hadijah bte Harris holding 225,000 shares and Datuk Harris Salleh, who was then the Chief Minister of Sabah, holding one share. Hadijah, who is the daughter of Datuk Harris, was the wife of Mohd Toufic Ozeir. The couple were not married yet at the time of the formation of the plaintiff. It is only necessary to mention the names of the shareholders because the plaintiff has alleged that the attitude of the defendant towards the plaintiff had changed when Datuk Harris was no longer the Chief Minister after the 1985 state general elections. The plaintiff did not have any contracts until the contract in the present case.

The defendant is a wholly-owned subsidiary company of Koperasi Pembangunan Desa (KPD) a statutory body of the government of the state of Sabah. Its managing director was one Dr Henry Liau (DW8).

In 1983, two poultry projects of considerable size and scale were being planned and to be undertaken by the defendant. The projects were to be sited in Papar and in Labuan. The total cost of the two projects was budgeted at RM40m. Out of this budgeted sum, RM37m was intended for the Labuan project.

On 14 July 1983, the managing director of the plaintiff company (PW1), wrote a letter to Encik Yusoff Nair, the managing director of Koperasi Pembangunan Desa, to confirm the plaintiff's acceptance to take over the construction, construction management, project management and procurement for the chicken farm project in Labuan at a fee of 15% of the total cost of the project. It would appear that there was some prior verbal discussion concerning the project in question between PW1 and Koperasi Pembangunan Desa or Encik Yusoff Nair. No tender was ever put up for the project. One would have thought that since the project involved such large expenditure out of public funds, the adoption of tendering procedures would be the proper course to take. Now counsel for the defendant has suggested that the plaintiff had no financial resources to undertake the project as the plaintiff asked for an advance of RM7m right from the beginning. If there had been a tender, it would have given the defendant an opportunity to see if the tenderer had the necessary experience, capacity and financial resources to undertake the project.

The plaintiff started work on the project sometime in June or July 1983. Apparently, there were some complaints by the plaintiff's construction manager that sites and drawings were not ready. In a letter dated 10 October 1983, the defendant refuted the plaintiff's claim that sites and drawings were not ready and pointed out that the main problem was due to the plaintiff's unwillingness to accept the budgeted sum and to make sure that the works be carried out within that sum as stipulated in the contract. Subsequently, the parties executed a contract dated 16 November 1983. The terms of the contract provided, inter alia, that the budgeted sum was RM17,116,016 for the works; that the plaintiff's fee would be RM2.5m; that the plaintiff would undertake to complete the works within the budgeted sum; and that revisions to the budgeted sum were to be made if there were changes to the drawings and specifications (cll 12 and 13). However, soon after the contract was signed negotiations seemed to have continued resulting in the plaintiff accepting a lump sum contract at

a price of RM18,827,618. A copy of the contract was signed on 19 March 1984 when the plaintiff was paid RM1m. The plaintiff only signed the other copies of the contract on 2 May 1984. The delay in signing all the copies would appear to be the unhappiness of the plaintiff regarding certain terms in the contract, as even after signing the contract the plaintiff wanted certain changes to be made and to be included in a supplementary agreement to the 2 May 1984 contract. The supplementary agreement, which was to be prepared by plaintiff's solicitors, was not prepared and executed.

It did not take long before some disputes in relation to the construction work in progress and the plaintiff's claim for payment began to arise between the plaintiff and the defendant. In July 1984, a serious dispute arose over the plaintiff's claim for payment. For reasons stated in the letter dated 24 July 1984, the defendant refused to entertain the claim of the plaintiff in full. The state government decided to intervene and on 26 July 1984 appointed a panel of three arbitrators, namely, Datuk KS Fung (PW3) who was then the Director of the Public Works Department, Encik Wahab Patail and Mr Sam Ramasamy. The disputes between the parties were dealt with by the arbitrators. In the award dated 31 July 1984, the arbitrators allowed the plaintiff a gross sum of RM1,573,180.50, which was roughly the difference between the amount claimed by the plaintiff and what the defendant had approved. In dealing with the dispute in respect of work done, the arbitrators observed that the substantial difference between what the plaintiff claimed and what the defendant was prepared to approve arose from the fact that there were defective works or works which were not done according to specifications. They were of the view that the defendant was entitled to withhold payment in respect of such defective and sub-standard works. The arbitrators also expressed the view that the conditions of access roads to the site were reasonable. The arbitrators made certain recommendations at the end of the award in the hope that things would improve in future.

Things, however, did not seem to have improved as hoped. For one thing, progress in the construction of the works was not satisfactory. This had attracted the attention of the Ministry of Agriculture and Fisheries Development. The Ministry, through its letter dated 17 November 1984, called for a meeting. The meeting was held on 26 November 1984 and the Minister, Datuk Lim Guan Sing, was informed by Mr Ng Poh Kah, who represented Koperasi Pembangunan Desa, that the progress of the project was slow and was far behind the previously agreed schedules. It was decided that the completion dates be extended and new handing over dates were fixed. The representatives of the plaintiff at the meeting requested that an independent surveyor to be engaged to assess the work done and they also expressed the view that the contract prices were low. The chairman, Encik Abdul Malek Chua, agreed to refer the matter to the Minister.

In a letter dated 2 January 1985, the Ministry informed the managing director of the defendant that following what transpired in the meeting (presumably on 26 November 1984), Datuk KS Fung had accepted the

appointment of an independent quantity surveyor on condition that he was given sufficient supporting staff. The defendant was also informed by the Ministry in the same letter that Datuk KS Fung had agreed to be the arbitrator/mediator between the plaintiff and the defendant. It is clear from the Ministry letter that as far as the appointment of independent quantity surveyor was concerned, all that the managing director needed to do was to communicate with the Director of Public Works to ask him to allow Datuk KS Fung to make use of the staff in the Public Works Department.

Following his appointment, Datuk KS Fung on 6 February 1985 forwarded priced bills of quantities prepared by the staff of the Jabatan Kerja Raya under his general supervision. He pointed out in his covering letter that the new price would be 55% higher than the contract price. The bills of quantities were forwarded by the defendant to the plaintiff who received them on 5 March 1985. This was followed by three meetings which were held on 16, 18 and 30 March 1985. At the end of the meeting on 18 March 1985, a document called 'Final summary' was prepared and initialled by the representative of the plaintiff and the quantity surveyor of the Jabatan Kerja Raya. This document, which is produced and marked as exh P1, shows a contract sum of RM37,971,579.27. The plaintiff contends that this was the concluded contract sum. Although the defendant does not deny the existence of this document and that it was signed on 18 March 1985, the defendant disputes that the sum stated therein was the finalized contract sum.

At the meeting held on 30 March 1985, a number of matters were raised and dealt with. The plaintiff and the defendant are now not in agreement as to what exactly was discussed and decided at that meeting.

Subsequently, a letter of intent dated 3 April 1985, was sent by the defendant to the plaintiff. This was confirmed and accepted by the plaintiff.

Issues

The main issues in this case are these:

(1) whether the letter of intent dated 3 April 1985 was a concluded contract between the parties;

(2) if the contract between the parties at the time of termination was not contained in the letter of intent but was contained in the May 1984 contract, whether the plaintiff was in breach of its obligations; and

(3) damages, if any.

ISSUE 1 — WHETHER THE LETTER OF INTENT DATED 3 APRIL 1985 WAS A CONCLUDED CONTRACT BETWEEN THE PARTIES

The contention of counsel for the plaintiff is in effect that at the meetings (16 and 18 March 1985) all the main terms of the new agreement were agreed upon producing a new total contract sum of RM37,971,579 as shown in the document produced in court as exh P1 which was prepared at the end of the meeting on 18 March and initialled by the plaintiff and

the Jabatan Kerja Raya quantity surveyor and that the agreement between the parties was confirmed by a letter of intent dated 3 April 1985. It is also submitted by counsel for the plaintiff that the plaintiff has part performed the 1985 contract by: (i) providing the letter of repayment guarantee; (ii) settling the items on the bills of quantities and submitting the amendments to Datuk KS Fung to be incorporated into the revised bills of quantities; (iii) calling for the supplementary agreement to be vetted; and (iv) obtaining and providing a performance bond from United Asian Bank. Counsel submits that where there has been part performance of a contract as in this case, the court will strain its power to enforce a complete performance even in the face of allegations of uncertainty in the terms of the contract and cites in support the case of *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 at p 204.

Apparently, the meetings on 16 and 18 March 1985 were held because the plaintiff was still not satisfied with the bills of quantities and the summary of prices submitted by Datuk KS Fung on 6 May 1985 which had the effect of increasing the contract price by 55% — from RM18,827,618 to RM29,179,972.77. Dr Henry Liau (DW8) in his evidence told the court that the meetings were chaired by Mr John Maluda and the discussions centred on the bills of quantities submitted by Datuk KS Fung. The defendant was prepared to accept those bills of quantities which showed the total sum of around RM29m but the plaintiff did not agree and requested various increases. According to DW8, the defendant did not agree to all the requests by the plaintiff, in particular prime costs and provisional sums, item of nests and doors were not agreed and that there were other contractual matters not discussed. As the Ministry required an approximate figure urgently to table to the Cabinet for funding, it was decided that an approximate figure be estimated. The Jabatan Kerja Raya quantity surveyor and the plaintiff's representative then worked out a figure of approximately RM38m. DW8 said that he was not there when exh P1 was signed. Was the figure RM37,971,579 as shown in P1 intended to be a finalized contract sum for the project? Or was P1 prepared for the purpose of supporting the request for an increased budget? Counsel for the defendant contends that the contract prices were not finalized on 18 March 1985 as there were still a number of matters to be worked out and agreed upon.

The defendant has produced a set of documents which purported to be the minutes kept at the meeting of 30 March 1985. The draft minutes were forwarded by Mr Ng Poh Kah who represented Koperasi Pembangunan Desa at the meeting to the permanent secretary of the Ministry on 9 April 1985. The draft minutes were not signed. The correctness of the draft minutes is disputed by PW1 who produced another set of minutes of the meeting. PW1, however, cannot recall who took his own minutes. It would appear that PW1's basis for disputing the correctness of the Ministry's draft minutes is based on his own minutes and not his own recollection of what matters were discussed and agreed upon at that meeting. On the other hand, the plaintiff's own witness, Datuk KS Fung (PW3) when he was shown the Ministry's draft minutes seemed to

remember what were the matters discussed at that meeting and confirmed that the Ministry's draft minutes were accurate. The correctness of the draft Ministry minutes were also confirmed by DW1 (Rainer Viet), DW7 (CK Chong) and DW8 (Dr Henry Liau). I have no hesitation in accepting the draft minutes of the Ministry as a correct record of the matters discussed and agreed upon at the meeting on 30 March 1985. It is clear from the draft minutes of the Ministry that quite a number of matters were raised, discussed and agreed upon at that meeting on 30 March 1985 and, amongst other things, it was decided that the water tanks costing a total sum of RM848,000 were to be deleted; that the works of internal electrical wiring and internal plumbing were to 'be brought into the bills of quantities system with the bills of quantities and rates of all items worked out and agreed upon before the signing of the supplementary agreement'. When counsel for the defendant referred PW1 to the draft minutes of the Ministry, PW1 disagreed with practically everything contained therein. PW1 even called para 5(b) of the said minutes 'a 100% fake item'. This paragraph states, inter alia, that the agreed advance to the plaintiff would be 15% of the contract sum subject to a maximum of RM3.7m and that the bank guarantee given for the advance payment would be replaced by a personal guarantee. PW1 maintained that the advance payment was to be 10% of the contract sum subject to a maximum of RM3.7m. It is to be noted that the letter of intent dated 3 April 1985 which was accepted and confirmed by PW1 specifically stated that the advance was to be 15%.

In my opinion, the contents of the draft minutes of the Ministry which were confirmed by PW3 and the witnesses of the defendant would support strongly the contention of counsel for the defendant that the sum of about RM37.8m as stated in exh P1 was not a concluded contract price. There were still a number of matters which remained to be dealt with at the end of the meeting on 18 March 1985 and that was why it was necessary to have a meeting on 30 March 1985. Even after the 30 March meeting, there still remained some matters to be worked out and agreed upon. It is, therefore, not improbable that the figure of RM37,971,579.27 was intended to be an estimate to be submitted to the Cabinet in order to obtain an increase in the budget for the project and not a concluded contract sum.

The letter of intent dated 3 April 1985 reads:

> Tuan
>
> Re: Letter of intent: Construction and completion of works of Desa Hatchery Sdn Bhd Poultry Project in Labuan by Kokomewah Sdn Bhd under an agreement dated 2 May 1984
>
> 1 We refer to the two meetings held between the various representatives of the contractor, the employer and the independent assessor/consultant on 18 March 1985 and 30 March 1985 in the meeting room of Ministry of Agriculture and Fisheries Development to discuss matters relating to the construction and completion of works of Desa Hatchery Sdn Bhd Poultry Project in Labuan by Kokomewah Sdn Bhd under an agreement dated 2 May 1984.

2 By this letter of intent we hereby agree and confirm the following decisions reached in the two meetings:

(a) that a supplementary agreement to the above agreement of 2 May 1984 be executed between Kokomewah Sdn Bhd and Desa Hatchery Sdn Bhd before 30 April 1985 which shall incorporate, inter alia, the revised date of completion of all the works being 31 March 1986 and an agreed revised bills of quantities to be drawn by Datuk KS Fung in accordance with decisions of the two meetings first mentioned above. The supplementary agreement shall also incorporate matters including but not limited to (b), (c) and (d) below which were discussed and agreed upon in the said two meetings.

(b) That the performance bond given on a joint and several basis by Encik Mohd Toufic Ozeir and Puan Hadijah Bte Harris be changed to a bank guarantee for an amount equivalent to 5% of the new contract price which shall be submitted upon or before the signing of the supplementary agreement.

(c) That the amount of advance being guaranteed in a letter of guarantee dated 23 June 1984 by Encik Mohd Toufic Ozeir and Puan Hadijah Bte Harris be raised to 15% of the new contract price subject to a maximum of RM3.7m. This should be done by an additional letter of guarantee to be given by your company to us for the amount of RM1,817,238.20, an example of such additional letter of guarantee is hereby attached herewith for your perusal and further action at your earliest convenience.

(d) That a further advance of RM1,817,238.20 (which would bring the total advances to Kokomewah to RM3.7m) be released to Kokomewah *only after* Desa Hatchery has received the said additional letter of guarantee stated in (c) above. The repayment of all advances made or to be made shall be in accordance with the relevant federal instruction, a photocopy of which (lampiran II/W para 2) is attached herewith and marked 'Appendix A'. (Emphasis provided.)

(e) Upon receiving a cheque from Desa Hatchery amounting to the said sum of RM1,817,238.20, Kokomewah shall immediately step up the works of that the same shall be completed by the revised date of completion, ie 31 March 1986.

3 Should your company agree to the above, (a) to (e) inclusive, kindly arrange to have the letter signed below (together with the two other copies as attached herewith) indicating your acceptance. Subsequently kindly return to us the duly signed duplicate and triplicate at your earliest convenience together with the fully executed additional letter of guarantee specified in (c) above. We shall then release the cheque for the said sum of RM1,817,238.20 as stated in (d) above.

We look forward to your early reply.

It is the plaintiff's case that this was a concluded contract. It is submitted by counsel for the defendant that the letter of intent has to be read in the context of the discussions and agreements reached at the meetings of 18 and 30 March 1985. It is pointed out by counsel that the letter of intent provides for a supplementary agreement to be executed and that such document must incorporate the agreed revised bills of quantities to be drawn up by Datuk KS Fung who told the court that he did not complete

the work because he assumed he would not be paid and not because he was asked to stop work. If the letter of intent was a concluded contract what was the finalized contract sum? The so-called new 1985 contract was essentially all about new prices and rates for the various items of works. It involved revisions of the prices provided under the May 1984 contract to be agreed upon by both parties. Negotiations after negotiations in respect of such matters seemed to have been made. Requests and negotiations for increase seemed to have started even before the signing of the 1983 November contract. At the time the letter of intent was issued, negotiations seemed to be still going on. There were still some matters which required further agreement pending the bills of quantities to be drawn up by Datuk KS Fung. To my mind there could only be a new contract after the parties have agreed on all the matters which required to be agreed upon and a finalized contract sum was reached.

Having carefully considered the submissions of learned counsel on both sides and the evidence, both oral and documentary, I have come to the conclusion that: (i) the sum of RM37,971,579 was not a finalized contract sum; (ii) the letter of intent dated 3 April 1985 was not a concluded contract; (iii) at all material time the parties have considered themselves to be still governed by the 1984 contract. In a letter dated 28 May 1985 from the superintending officer to the plaintiff, the superintending officer stated: 'As you are aware we only have the contract dated 28 May 1984 and I believe the supplementary agreement is yet to be executed ...'. The plaintiff did not refute this in its letter in reply to the superintending officer's letter. In fact, the plaintiff in its letter dated 6 June 1985 required the defendant to act in accordance with Appendix K which formed part of the 1984 contract; and (iv) the intention and understanding of the parties was that the 1984 contract was to be replaced by the supplementary agreement to be executed.

In para 14A of the amended reply, the plaintiff contended that the defendant by reason of their conduct in all the circumstances of the case are estopped from denying:

(a) that the May 1984 contract had been replaced or substituted by the agreement dated 3 April 1985;

(b) that the Jabatan Kerja Raya terms and conditions were applicable to the contract dated 3 April 1985; and

(c) that there was an agreement between parties to perform the contract for an agreed sum of RM37,971,579.27.

In the circumstances of the present case and in the light of the conclusions above, I do not think that the defendant is estopped from denying these matters. As regards the conditions of the new 1985 contract, DW8 has denied that there was any discussion or agreement that the Jabatan Kerja Raya conditions were to apply. The plaintiff seems rely on exh P4. The explanation of DW8 is that the whole of P4 was the standard document used by quantity surveyors to prepare documents and was simply used by Datuk KS Fung to determine the rates and quantities whenever necessary and it was not for Datuk KS Fung to determine the contract conditions.

A A closer scrutiny of P4 and the fact that the parties continued to refer to the general conditions of contract in the May 1984 contract seem to bear this out. I also do not think that this is a case where the court should strain its powers to enforce a complete performance in spite of uncertainties in the terms of the contract as has been urged upon the court by counsel for B the plaintiff. The situation in *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 was quite different. That was an action brought by the tenant of business premises for specific performance after the tenant had entered into possession for a period of three years and paying the monthly rentals regularly.

C Before I proceed to consider the next main issue, I need to deal with another matter here. This concerns the position of the superintending officer. It would appear from exh P4 that there would be a change of the superintending officer from CK Chong to Daya Bina Akitek Sdn Bhd. According to DW8, there was no discussion in relation to the change of superintending officer and there was no necessity for the superintending D officer to be changed. He would not have wanted it. He said that Daya Bina Akitek Sdn Bhd was not engaged by the defendant but by Lohmann, and Daya Bina Akitek Sdn Bhd were not undertaking supervision work. There is no evidence that Daya Bina Akitek Sdn Bhd had in fact been asked to come in and that they had performed any of the duties of the E superintending officer. On the other hand, the evidence shows that the plaintiff continued to regard and deal with CK Chong as the superintending officer as can be seen from the letters and other correspondence produced in court. I do not think, therefore, that the superintending officer was changed from CK Chong to Daya Bina Akitek.

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ISSUE 2 — IF THE CONTRACT BETWEEN THE PARTIES AT THE TIME OF TERMINATION WAS NOT CONTAINED IN THE LETTER OF INTENT BUT WAS CONTAINED IN THE MAY 1984 CONTRACT, WAS THE PLAINTIFF IN BREACH OF ITS OBLIGATIONS?

The May 1984 contract was terminated by the defendant under cl 34(a) G which reads:

> Default — If the contractor shall make default in any of the following respects, namely:
>
> (i) without reasonable cause wholly suspends the works before completion;
>
> (ii) fails to proceed with the works with reasonable diligence;
>
> H (iii) refuses or to a substantial degree persistently neglects after notice in writing from the superintending officer to remove defective work or improper materials,
>
> then, if any such default shall continue for seven days after a notice sent by registered post to the contractor from the superintending officer specifying I the same, the superintending officer may (without prejudice to any other rights herein contained) thereupon by notice sent by registered post determine this contract; provided that notice hereunder shall not be given unreasonably or vexatiously and such notice shall be void if the employer is at the time of the notice in breach of this contract.

On 12 June 1985, two notices: (a) to step up works; and (b) to remove, rectify and make good various works which were not in accordance with the drawings and specifications, were given to the plaintiff by the superintending officer under cl 34(a)(ii) and (iii) of the contract, respectively. Following these two letters, a letter dated 4 July 1985 to determine the contract was sent by the superintending officer to the plaintiff. This letter reads:

> Dear Sir
>
> Re: Agreement dated 2 May 1984 between Desa Hatchery and Kokomewah Sdn Bhd for the construction and completion of Parentstock Broiler Farms and Hatchery and Processing Plant at Labuan
>
> We refer to our two (2) letters, the first, Ref DH/LBN/3B/104 dated 12 June 1985, and the second, Ref 3DH/LBN/3B/105, dated 12 June 1985 regarding the above for your kind attention.
>
> We regret to note that no works have been done to remove and make good defective works listed in our aforementioned letter, Ref DH/LBN3B/105 dated 12 June 1985, under para 2, sub-para (a) or (b) or (c) or (d). Under para (e), most of the defects have not been rectified.
>
> Under our letter ref DH/LBN/3B/104 dated 12 June 1985, there is hardly any improvement in the rate of progress for the work on all sites.
>
> We regret to inform you that we have no choice but to determine the above agreement in accordance with cl 34(a)(ii) and/or 34(a)(iii) of the conditions of contract annexed thereto and marked 'E'.
>
> Please note that you are to hand over all sites you are now in possession and any plant, materials, machinery or equipment with immediate effect and thereafter you are prohibited from entering the said sites or removing the said plant, materials, machinery or equipment.
>
> Thank you.
>
> Yours sincerely
> for Desa Hatchery Sdn Bhd
> CK Chong
> Superintending officer

The plaintiff now claims that the determination of the contract was wrongful because according to the plaintiff the defendant had acted unreasonably and vexatiously. The plaintiff denies that it was slow in performing the works and has alleged that the delay was caused by the defendant's failure to hand over the sites on time and to supply drawings and specifications. The plaintiff has also alleged that the termination was done with the fraudulent intention of denying to the plaintiff the rights accruing to them under the 1985 contract.

It is submitted by counsel for the plaintiff that it is evident from the conduct of the defendant that after the Sabah elections which were held in April 1985, the defendant decided to terminate the contract by whatever means as PW1's father-in-law was no longer Chief Minister and that the letter of termination and the notices to step up works and to remove and rectify defective works were in fact rehearsed acts to get the plaintiff out of the construction site. During the trial, questions were put to DW7 and

DW8 that their attitude towards the plaintiff had changed after PW1's father-in-law was no longer Chief Minister. A question was also put to DW8 by counsel for the plaintiff that he instructed DW7 to act harshly and oppressively against the plaintiff. These were all denied by DW7 and DW8. The plaintiff seems to rely mainly on exh P18 and payment certificate No 9 as showing that there was fraudulent intention on the part of the defendant. Exhibit P18 is a memorandum dated 3 May 1985 from the permanent secretary of the Ministry of Agriculture and Fisheries to the Minister. The permanent secretary, after pointing out that the progress by the plaintiff was so slow that he expected a year's delay and expressing the view that the delay was made deliberately in order to get the government to review the rates originally agreed upon (para 10), and that after the rates were revised by Datuk KS Fung from RM18.8 to RM29.2m, the plaintiff still protested and requested for further negotiations (paras 11 and 12) suggested to the Minister that the contract with the plaintiff 'be terminated in whatever manner and the tender floated in the open market'. The response of the Minister to the suggestion appears in the form of a handwritten note initialled by Mr Joseph Kurup who was then the Minister of Agriculture and Fisheries and dated 12 May 1985. Based on this, it is submitted by counsel for the plaintiff that the decision to terminate the contract was made on or before 12 May 1985. With respect, I do not think it is quite correct to say that the note is a clear indication that the decision to terminate was made on 12 May 1985. From the note, the Minister in fact acted with caution and wanted the case to be referred to the Attorney General to see if there were sufficient grounds for termination. Looking at the contents of P18 (including the handwritten notes) as a whole, the suggestion that the contract 'be terminated in whatever manner' did not sound as bad as the plaintiff was trying to make it out to be.

As regards payment certificate No 9 issued by DW7, it is contended by the plaintiff that it was a fraudulent certification done without basis and arbitrarily with the intention to purposely create a situation for the defendant to terminate the contract. The defendant through its witnesses, DW7 and DW1, has denied this. Both DW1 and DW7 in their evidence have explained how they arrived at the figures shown in certificate No 9. According to them the calculations were as contained in p 52 of bundle U with supporting calculations as shown in U53–U66. DW7 also told the court that certificate No 9 and the calculations were prepared based on assessment of the plaintiff's claims in P2. DW7 justifies the deductions in respect of concrete works by saying that the deductions were made because after visiting the site he observed that the concrete looked very bad and sand was coming out of the surface in some places. According to him, the plaintiff had failed to provide original test cubes certificates and he refused to accept photostated certificates so he made those deductions. In respect of material on site, DW7 said that sometimes he allowed the claim even though the materials were not stored on site. He disallowed the claim for zinc sheets which were not stored on site because it was the most expensive item in claim No 9 and he insisted that the contractor put the zinc sheets on site. It seems to me these were matters which the superintending officer had the discretion to decide one way or the other. If the plaintiff was not

happy with his decision in respect of such matters, the course open to the plaintiff was to refer it to arbitration. The plaintiff has not called any witnesses to show that the certification was fraudulent. On the evidence before the court, I do not think, therefore, that the plaintiff has succeeded in establishing fraud on the part of the defendant even on a balance of probabilities, assuming that that is the burden of proof. In any event, in deciding whether the termination was wrongful or not, the most important consideration, in my view, is whether there was delay and other breaches as claimed by the defendant and whether in all the relevant surrounding circumstances including the extent of such breaches, if any, the defendant was justified in determining the contract.

It would appear that as early as June 1984, certain defective works were discovered as a result of site visits made by the consultant engineer from Lohmann, Mr Viet (DW1). In his report dated 18 June 1984, (supported by photographs) to the superintending officer, DW1 pointed out the defects in concreting work and timber construction in respect of Farm P1. The report also pointed out that for Farm B1, house 18, the concrete foundations were not up to the required quality. The consultant engineer recommended that the work be stopped immediately and that the defective works be removed and rectified according to drawings and specifications. On 20 July 1984, DW1 submitted another report to the superintending officer complaining again about the foundations, reinforcement, the lack of spacer blocks, the ramp and about the roofing sheets not being up to specifications and not being installed properly.

Towards the end of July 1984, when the claim for work done was made by the plaintiff, the superintending officer was not prepared to approve payment for the defective works. The arbitrators visited the site on 29 July 1984 and, in their award dated 31 July 1984, recognized the right of the defendant to withhold payment until the defective and sub-standard works were rectified. Thus, the existence of defective works or works done not according to specifications were affirmed by the arbitration award.

No reasonable steps to rectify works and to improve the standard of work seemed to have been taken by the plaintiff after the date of the arbitration award. Site inspections were carried out by DW1 on 19 and 20 November 1984 on Farms P1, P2, B1, the hatchery and the processing plant. The report prepared by DW1 after such inspections and the photographs taken by him to substantiate the report (V61–V88) listed the defective works found by DW1 in those areas and also mentioned the works not rectified. Another report dated 4 June 1985 and photographs to support it were prepared and submitted to the superintending officer after site inspections on 31 May 1985 and 2 June 1985 by DW1. One of the complaints contained in the report was that the timber structures in a number of houses in Farm P1 were undersized and not according to specifications and that the workmanship and quality of the timber was not acceptable. In his evidence, DW1 said that those parts of his reports which were not supported by photographs were based on his visual inspection. The accuracy of the various reports mentioned above was not seriously

challenged by the plaintiff and the court sees no reason not to accept as correct the contents of the reports and the photographs.

According to DW7, he agreed with the contents of the various reports prepared by DW1. He forwarded the report dated 18 June 1984 to the plaintiff on 19 June 1984 with instructions to rectify the works. He said that he also gave notice to the plaintiff to complete the rectification works by the end of February 1985 in respect of the works which he had listed in his letter dated 11 February 1985.

The defendant has produced letters issued by DW7 and DW8 to show that apart from the notice to step up work issued on 12 June 1985, it had on previous occasions given notices to the plaintiff regarding delays, slow work and suspension or stoppage of work. On 11 February 1985, DW7 found upon site inspection that works at all sites were suspended without reason. DW7 after referring to cl 34 of the contract instructed the plaintiff to resume and proceed with the work immediately. DW8 also wrote to the plaintiff regarding the stoppage of work in February 1985. In the letter dated 19 February 1985, DW8 stated that the defendant viewed the lack of activity on the various sites very seriously and DW8 also reminded the plaintiff that even though Farm P1 was supposed to be handed over to the defendant complete by the end of December 1984, the works had yet to be completed. When the plaintiff failed to respond to DW's letter dated 19 February 1985 and there was still no activity on the sites, DW8 wrote again to the plaintiff. The plaintiff replied to DW8's letter on 2 March 1985 saying that it had not lost interest in the project but did not indicate when it would resume work. Notices had also been given to the plaintiff regarding delays in fixing roofing sheets which affected the quality of the timber structure at sites P2 and B1 and regarding stoppage of piling works at the processing plant on 8 March, 15 May and 21 May 1985, respectively.

On the facts outlined above, it is clear that some of the works carried out by the plaintiff were defective in that the plaintiff had not taken the necessary care to ensure that the works were of the required standard or quality and in accordance with specifications and drawings, eg the use of swamp water and incorrect mix of cement for concreting, the use of undersized timber and so on. It is also clear that there had been some delays in the performance of the contract.

The works which the plaintiff were required to remove, rectify and make good were stated in para 2 of the 'Notice to remove defective works and materials' dated 12 June 1985. That paragraph reads:

> Your attention is drawn to the following items which are *not* in accordance with the drawings and specifications. Notice is hereby given to remove, rectify and make good the following immediately:
>
> (a) Hatchery site (H) — you are hereby instructed to remove and reconstruct all formwork and reinforcement to the ground beams which are *not* in accordance with drawings and specifications, ie the finished floor level should be 200mm (18") above the existing ground level and *not* 650mm (26").

(b) Processing plant site (PP) — in the pile caps C5, A6, B7, B8, B9 and B16, all the piles were in random positions and *not* according to the drawings and specifications. You are hereby instructed to rectify and make good the above-mentioned defective works.

(c) Broiler Farm B1 — You are hereby instructed to remove and replace all undersized timber and all inferior quality timber such as those that are twisted, shrunk, fungus affected and discoloured to the erected timber structure on houses No 10, 11, 12, 13, 14, 15 and 16.

You are also instructed to remove and reconstruct the concrete slabs for house No 7 which are not in accordance with drawing and specification, ie spacer blocks should be provided and placed below the reinforcing mats before the pouring of concrete.

(d) Parentstock Farm P2 — You are hereby instructed to remove and replace all undersized timber and all inferior quality timber such as those that are twisted, shrunk, fungus affected and discoloured to the erected timber structure on all the four houses No 1, 2, 3 and 4.

(e) Parentstock Farm P1 — You are hereby instructed to replace all bolts without heads; install all missing bolts; tighten all loose nuts; realign all bolts badly out of centre; replace all underspecified washers in all the six houses No P1, P2, PS3.1, PS3.2, PS4.1 and PS4.2.

You are also instructed to provide proper expansion joints to the concrete slabs; remove and replace all undersized and poor quality timber; and replace the badly installed wiremesh in all the six houses No P1, P2,PS3.1, PS3.2, PS4.1 and PS4.2.

If it is true, as PW1 has claimed, that the problems relating to piling, timber and concrete were in fact discussed and resolved at the meetings held on 16, 18 and 30 March, 1985, it would be wrong for DW7 to include such matters in the notice to rectify works. I cannot, however, find anything in the minutes of the meeting which would indicate that the matters had in fact been raised and resolved. DW8 who attended all three meetings and DW1 and DW7 who attended the meeting on 30 March 1985, have denied that those matters were raised and resolved. Under cross-examination, DW7 said that the meeting on 30 March 1985 was held to discuss prime cost, etc, and had nothing to do with piling, timber and defective works. He was not aware that those matters had been resolved in previous meetings which he did not attend. If, indeed, those matters had already been resolved, one would expect the plaintiff to point this out and to protest immediately when it received the notice dated 12 June 1985 to rectify the works. In what manner was those matters resolved? Did the defendant agree to accept those defective works without rectification by the plaintiff? PW1 in his evidence did not say so. In the circumstances I find that it is more probable than not that the meetings on 16, 18 and 30 March 1985 were so preoccupied with negotiations for new prices and rates in connection with the supplementary agreement that the parties were not able to discuss the matters relating to defective works.

Paragraph 2(a) — hatchery

There is no dispute that the finished floor level was 26" above the existing ground level and not 18" as specified in the drawing (exh D34). It is

A argued by the plaintiff that the discrepancy in the architect's drawing caused the increased level. When DW1 produced the two drawings, he explained that the two drawings had to be read together and excavation not related to difference in ground levels as the drawing clearly showed the finished floor level to be 200mm (18") above ground level. He further
B explained that to look for the finished floor level one has to look at the architect's drawing and he was of the view that the initial errors were that of the contractor. It is contended by counsel for the defendant that if there was any discrepancy, the plaintiff should have referred the matter to the superintending officer and if the plaintiff chose to follow one drawing in preference to the other it did so at its own risk. DW1 in his evidence in
C court also said that the initial problem was due to the poor concrete strength of the foundations caused by the use of nearby swamp water for concreting. He wanted the poor concrete removed. However, when the plaintiff's project manager, Mr Brian McDermid, pointed out that it would involve a lot of work to remove the foundation and suggested that
D the situation be remedied by putting another foundation on top of the existing one, which would involve putting a 450mm-thick slab on top of each pile cap and raising the existing ground levels to a height of 45mm, he and DW7 agreed to the suggestion on condition that there would be no claim for extra cost or work. As the plaintiff made claim for extra earth work despite the agreement not to make a claim for extra work, DW1 and
E DW7 decided that the plaintiff be asked to remove and to reconstruct the said work. Since the suggestion to remedy the defects came from the plaintiff's project manager and this had been agreed to by DW1 and DW7 on condition that no claim for extra work be made, the plaintiff should have proceeded to rectify the work without further delay. As it was, the
F defects were not remedied when DW7 issued the notice on 12 June 1985 and the plaintiff had claimed for earth work and such defects remained unrectified on 4 July 1985 when the notice of termination was issued by DW7. In the circumstances, I am of the view that there had been a failure on the part of the plaintiff to comply with para 2(a) of the notice.

G *Paragraph 2(b) — piling*

The plaintiff has not denied that pile caps mentioned in this paragraph were in random positions and not according to the drawings and specifications. In any event, the reports and the photograph attached prepared by DW1 show that the problem did exist. The plaintiff's
H explanation is that the problem was a normal construction problem caused by the ground condition.

Counsel for the defendant submits that such an answer is not sustainable because the specifications at para 1.5 stipulate that the contractor is to satisfy itself as to the nature of the ground. Apparently some discussion
I between the plaintiff and defendant were held as to how best to solve the problem. It would appear that it might be possible to rectify the piling work by redesigning the pile caps to suit the existing pile configurations. By a letter dated 17 June 1985, the defendant communicated the comments of the design engineer to the plaintiff. On 25 June 1985, the plaintiff was

informed by the defendant by a letter that in order to enable the design engineer to determine whether the piling works were acceptable or whether any remedial works were necessary, the design engineer would need a survey report of the exact as piled position at the cut-off level and the jolt of each pile and the defendant asked the plaintiff to arrange without delay for the survey to be done by a licensed surveyor. There is no doubt that it would take some time to carry out the rectification work and that it could not be done within a period of three to four weeks. In the light of the letter dated 25 June 1985, if the plaintiff had arranged for a licensed surveyor to carry out the necessary survey, I do not think it is open to the defendant to argue that there was no compliance with para 2(b). The plaintiff, however, decided not to do anything and no surveyor had been arranged for. Thus, the plaintiff, in my view, failed to comply with para 2(b).

Paragraph 2(c), (d) and (e) — timber and concrete slabs

The various reports substantiated by photographs prepared by DW1 mentioned earlier have clearly shown that a considerable amount of undersized timber and timber of inferior quality were used in the construction of quite a number of the houses in Farms B1, P1 and P2 as mentioned in this paragraph. The report of the wood technologist, Dr Ong Seng Heng (DW4), also shows that quite a high percentage of the timber used was not suitable or of poor quality. As regards the strength of the concrete this is covered by the report of Geosoil Testing Services Sdn Bhd. DW5, Mr Kenneth Chin, who conducted the testing, confirmed the report. It is argued by the plaintiff that the subsequent deterioration of the timber was to be expected because of the absence of preservative treatment and the exposed nature of the open sided buildings and that the deterioration would almost certainly have been exacerbated by the defendant's insistence on the use of zinc sheets with double sided coating which were difficult to obtain and had to be ordered specially from Japan. As pointed out by DW1, the zinc sheets from Japan were used by the contractor in the Papar project and the contractor there did not encounter any difficulty. It is, he said, just a matter of organization. I agree. On going through the evidence as a whole before the court, one does get the impression that the plaintiff expected the defendant to accept without question all the works it had completed and that the plaintiff would without any hesitation turn to the Ministry for assistance for any dispute it had with the superintending officer and the consultant engineer. Here again, I find that the plaintiff had failed to comply with para 2(c), (d) and (e) of the notice to rectify work.

Delay

I do not think there is any doubt that the progress of work was slow and there was delay in the construction of the project by the plaintiff. Works were not carried out according to schedules. In November 1984, the lack of progress in the construction had attracted the attention of the Ministry which called for a meeting on 26 November 1984. At that meeting, it was found necessary to extend the completion dates and to fix some new handing over dates. It is not unlikely in my view that the delay was caused

partly by the lack of proper site organization and frequent change of key personnel as observed by the arbitrators in their award. There would also appear to be suspension and stoppages of work. In February 1985, there was quite a long stoppage of work which prompted the superintending officer (DW7) and DW8 to draw the plaintiff's attention to cl 34 of the contract. The plaintiff now denies that there were stoppages of work. The plaintiff says that there was only a reduction of staff or workers. In his letters dated 19 and 27 February 1985 to the plaintiff, DW8 told the plaintiff that he viewed seriously the lack of activity on the various sites and reminded the plaintiff that Farm P1 was supposed to have been completed by the end of December 1985, yet the work had not been completed. DW8 also asked the plaintiff whether it had lost interest in the contract. The plaintiff in its reply to DW8's letters stated that it had not lost interest but did not deny that there were stoppages.

At the time of termination on 4 July 1985, the work on Farm P1 was still not completed. The evidence of DW7 and the chart prepared by him show that Farm P1 was 97% complete, Farm P2 was 54.13% complete and Farm B, 44.05% complete. On Farm B1, which was handed over on 3 January 1985, only 0.5% progress was achieved in the six months until determination on 4 July 1985. On Farm B3, there was 0% activity for six months. Farm B4 also shows no activity from handover on 1 April 1985, a period of three months. In respect of the processing plant and hatchery, for the former, only 50% of the piling work was done and for the latter, work only reached the stage of formwork and reinforcement for the ground beams. DW1's evidence also shows that the progress of work in the month of June 1985 was 0.7% for Farm B, 0.5% for Farm P1, 0% for Farm P2 and 0.5% for Farm B2. Thus the evidence of DW7 and DW1 would show that there was no improvement in the work progress.

It is contended by the plaintiff that the delay was caused by the defendant's delay in handing over sites and the lack of drawings and specifications and so on. However, the complaints of delay by the defendant were in respect of sites which had already been handed over to the plaintiff. If more sites were handed over, would it not make the problem of delay worse? The lack of drawings and specifications have also been denied by DW1.

In all the circumstances, I am of the opinion that there was delay and the plaintiff had failed to comply with the notice to step up work as well as the notice to rectify works. In the result the determination of the contract by the defendant, in my opinion, was justified.

Defendant's counterclaim

After the contract was terminated, there was some discussion between the plaintiff and the defendant regarding appointment of an independent quantity surveyor to carry out a joint survey of the site. The plaintiff wanted a firm from Singapore to be appointed and suggested if no agreement was reached, each party was to appoint its own surveyor. The defendant gave to the plaintiff the names of three firms registered in Malaysia, as it

did not want a non-Malaysian firm and asked the plaintiff to nominate any other quantity surveyor registered with the Board of Surveyors, Malaysia, if it did not agree to any of the three firms suggested by the defendant. When no nomination was made by the plaintiff, the defendant went ahead and appointed Thien Bak Hin (DW6) of Building Quantities Sdn Bhd.

The defendant informed the plaintiff that site visits would be made by Mr Thien on 20–22 August to familiarize himself with the site and that a detailed survey would commence on 27 August 1985 and invited the plaintiff's representatives to be present. The plaintiff requested permission to visit the site earlier and this was allowed by the defendant. It is, however, not clear whether the plaintiff's representatives visited the site and made any survey as the plaintiff has not produced any report on the survey or any other evidence to show the value of work done and so on.

Mr Thien confirmed his report which is produced. The report of Mr Thien shows that the total value of work done by the plaintiff was RM3,075,139.99 and the total value of materials on site was RM1,080,007. Defective work was valued at RM1,605,570.65.

The defendant has not adduced evidence to substantiate its claims for liquidated damages, loss of bank interest and loss of revenue as stated in its amended counterclaim. As no mention of these claims is made in the written submission of counsel for the defendant, these claims can be regarded as having been abandoned.

The defendant engaged other contractors to rectify and to complete the work in Farms P1 and P2. I am satisfied from the evidence of DW7 and exh D40 (p 3 item 4.2) that the defendant did incur the sum of RM97,388.25 as costs of rectification and additional costs of completion for the work in those two farms. The evidence of DW7 and DW8 has also established that the defendant incurred miscellaneous expenses which included fees (RM34,305.76) paid to the quantity surveyor amounting to RM94,421.23.

As regards the cost of defective work assessed by DW7 to be RM946,081.63 based on details shown on pp 3–7 of D40, it is contended by the plaintiff that this is an inflated claim. Counsel for the plaintiff has pointed out that in certificates No 3–7, the sum of RM165,355 was constantly stated as costs of rectification works and other defects and in certificate No 8 the sum was RM124,615. Then suddenly the amount was increased to RM679,630.80 in certificate No 9. The explanation of DW7 for the increased deduction was that more defective works were discovered during the excavation for pile caps in the processing plant site and he made a reassessment, and that the deduction in certificates No 7 and 8 did not include pilings. In any event, having regards to the various reports prepared by DW1, the report of DW4, the wood technologist, and the report of the quantity surveyor (DW6) which reflected quite considerable amounts of defective works and use of unsuitable materials, eg timber, the claim of the defendant for the sum of RM946,081.63 for defective works does not seem to me to be unreasonable especially in the absence of any report or survey being given by the plaintiff. In the result, I agree with counsel for

the defendant that the state of the account between the plaintiff and the defendant is as follows:

1 Work done by plaintiff		RM3,075,139.99
2 Materials on site		RM1,080,007.00
	Total	RM4,155,146.99
Less:		
3 Additional cost and defective work	RM1,043,469.88	
		RM3,111,698.11
Less: Miscellaneous	RM94,421.23	
		RM3,017,275.90
Less: Paid to plaintiff (including advance payment of RM3.7m)	RM6,227,193.10	
Amount due to defendant		RM3,209,917.20

For the reasons given above, the claim of the plaintiff is dismissed with costs. There will be judgment for the defendant on its counterclaim for RM3,209,917.20 with interest at 8%pa from the date of filing of the counterclaim and for costs.

In case the plaintiff wishes to take this matter a step further and I am considered by the higher court to be wrong in coming to the conclusions that there was no concluded contract based on the letter of intent or that the defendant was justified in determining the May 1984 contract, I will now say a few words about the damages claimed by the plaintiff as set out in Schs I and II to the statement of claim.

It is settled law where a plaintiff brings an action for damages, he must prove it. Before he can recover, he has to discharge the burden of proving both as to the fact of damage and as to the amount. The authority for this is *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100 where Ong Hock Thye FJ, delivering the judgment of the Federal Court, said:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application, I would quote Lord Goodard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89:
>
> > '... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying,

> "This is what I have lost; I ask you to give me these damages." They have to prove it.'

The plaintiff relies on s 74(1) of the Contracts Act 1950 which provides:

> When a contract has been broken, the party who suffer by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The provision of this section does not, in my view, relieve the plaintiff in the present action from proving the fact and the amount of damage which it alleges it has suffered.

The only evidence called by the plaintiff to prove damages is the bare statement by PW1 in court:

> We expected to profit from 35–50% of the contract value.
>
> We expected this high return because the majority of the work involved concreting and timber construction. We were importing cement in big quantities and we had our own concrete plant. Labuan was a duty free port. In 1984 and 1985 there were a lot of contracts available.
>
> We are claiming about 35% to 50% of the figure in exhibit P1 as being our profit margin. We had almost completed a few units.

Thus the plaintiff has not introduced any evidence to prove the amount of damages and the figures stated by the plaintiff in Schs I and II have not been substantiated. Applying the principles enunciated in *Guan Soon Ting Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, the plaintiff, if it succeeds in the present action would, to my mind, only be entitled to an award of nominal damages.

However, if it is felt that in the present case the court must, despite the lack of evidence, still do the best it can to asses the damages claimed by the plaintiff, this can only apply to the claim for loss of profit and there is no need for the court to assess the other claims stated in Schs I and II for the following reasons:

(1) For work done and materials on site, the court sees no good reason not to accept the evidence of the quantity surveyor.

(2) For damages for breach of contract, the plaintiff has failed to show that the delays were caused by the defendant and not caused by the plaintiff's own default. The plaintiff cannot have any claim for cost of removal of defective timber which were due to its own default.

(3) The plaintiff has failed to explain what is meant by incomplete recovery nor adduced any evidence as to liability and quantum.

This brings me to the question of what percentage of profit should be used to calculate the loss of profit in the present case. Is it 35%? Or it is 55%? The difference can be quite considerable. Or is it something else? It is submitted by counsel for the defendant that if it is considered that the plaintiff should be awarded not just nominal damages (not conceded by defendant) then the profit should be ascertained within the context of the

A contract entered into. Counsel for the defendant suggested that the percentage should be below 15% and has pointed out that: (i) the plaintiff in its letter to the defendant had stated a figure of 15% for the 1983 contract which included the management cost; (ii) cl 13(iii) of the 1984 contract provides for 15% to cover cost of plant, tools, scaffolding supervision and profit for day work claims and this is repeated at 232C; B and (iii) during the negotiations in 1985, at the meeting of 30 March 1985, a figure of 15% was used to cover overheads, risks and profit for nests. Based on these facts and as after determination of the contract, the plaintiff had no further overheads and risks, counsel for the defendant suggested that 5% would be a fair grant of profit bearing in mind the C plaintiff's failure to prove the same. It does impress upon me, from the negotiations since the very beginning and the documents before the court, that the profit margin of 15% was very much in the mind of both parties. In all the circumstances, I think, a profit margin of 10% would be reasonable.

The next question is 10% of what sum of money? It is contended by D counsel of the defendant that for the purpose of calculating profits, certain sums ought to be deducted from the alleged contract sum of RM37,971,579.27. Counsel says that the alleged contract sum of RM37,971,579.27 included a contingency sum of RM1.8m and as the contingency sum was expendable only in an unforeseen eventuality and as there was no certainty of expenditure, there could not be any expectation E of profit from it. Counsel further says that if there was a new contract for RM37.9m the conditions of contract allowed deduction for prime cost and provision at sums without any claim for loss of profit. As the alleged 1985 contract contained a sum of RM3,337,800 for prime cost and provisional sums in Pt I and RM4,217,500 in Pt II, these figures should be deducted F from the contract.

With respect, I agree with counsel for the defendant that the above-mentioned sums should be deducted from the contract sum for the purpose of calculation of profit. This would effectively reduce the contract sum to RM28,616,279.27 ((RM37,971,579.27 - (RM1,800,000 + RM3,337,800 + RM4,217,500)). This sum is to be further reduced by work done and G materials already supplied amounting to RM4,155,146.99, which leaves a balance sum of RM24,461,132.01. The expected profit of the plaintiff under Sch I would, therefore, be RM2,446,113, approximately.

What I have stated above should also apply to the claims under Sch II. The contract sum under the May 1984 contract was RM18,827,618. H After deducting from it for work done plus material on site this leaves a balance of RM14,672,472. The expected profit for the plaintiff would therefore be approximately RM1,467,247.

Plaintiff's claim dismissed; defendant's counterclaim allowed.

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Reported by Kevin Ooi